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No. 80-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF THE PETITIONER

The Associated General Contractors of America, Inc. ("AGC") hereby submits this brief in support of the petitioner in No. 80-1808 on a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 17, 1981.

INTEREST OF THE AMICUS CURIAE[1]

The Associated General Contractors of America, Inc. is a national trade association consisting of 113 state and local chapters and representing 30,000 firms, in-

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36 (2). Letters of consent are on file with the Clerk of this Court.

cluding approximately 8,400 of America's leading general contracting firms, engaged in the construction industry in the United States and Puerto Rico. AGC member firms are responsible for the employment of approximately 3,500,000 employees. Construction is the largest industry in the United States, and the members of AGC perform approximately 80% of the general contracting construction business performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities.

The AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes rendering assistance to courts in their deliberations on significant decisions concerning labor-management relations in the construction industry, including the filing of a brief *amicus curiae* with the Ninth Circuit in the case now before this Court.

The specific question presented by this case is whether the partial *en banc* panel of the Court of Appeals for the Ninth Circuit erred in concluding that the construction industry proviso to Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) protects any restrictive subcontractor clause agreed to in a "collective bargaining relationship" notwithstanding that the clause allows substantial "top-down" organizing without avoiding jobsite friction between union and non-union workers.

A reversal of the Ninth Circuit decision is particularly vital to the interests of the AGC, its members and their employees. The employees of many AGC members are represented by building and construction trades unions who constantly seek agreement upon restrictive subcontracting clauses. Inded, almost all such restrictive sub-

contracting clauses in the construction industry are sought by unions from general contractors, rather than from subcontractors, and AGC's general contractor members number approximately 80% of the construction general contractors in the country. Until the Ninth Circuit is reversed, the employees of AGC members and their subcontractors will remain subject to "top-down" organizing pressures by construction unions which deny employees the right to choose whether or not they desire union representation.

SUMMARY OF ARGUMENT

This case and its companion[2] deal with the legality of restrictive subcontracting agreements negotiated as part of a collective bargaining agreement between a construction contractor and a union which limits the contractor's right to subcontract construction site work on all his jobs to only subcontractors who have agreements with certain specified unions.

This *amicus* contends that such clauses violate Section 8(e) of the National Labor Relations Act ("NLRA") (29 U.S.C. § 158(e)) unless they meet all of the requirements of the so-called construction industry proviso to that Section (§ 8(e)). According to this Court in its *Connell* decision[3] those requirements are:[4]

1. The agreement must arise in the context of a collective bargaining relationship between the construction contractor and the union, *and*

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[2] *Woelke & Romero Framing, Inc., v. N.L.R.B.*, No. 80-1798.

[3] *Connell Construction Co. v. Plumbers and Steamfitters*, 421 U.S. 616 (1975).

[4] The statute makes clear that a legal construction restrictive subcontracting agreement must be between a union and an employer in the construction industry and must be limited to on-site construction work. (§ 8(e), first proviso). The additional requirements for legality were set forth by this Court in *Connell* in order to carry out Congress' desire that the § 8(e) proviso be harmonized with the rest of the National Labor Relations Act.

2. The agreement must be limited to a specific job site in the sense that:
   a. It must cover only one job of the agreeing contractor and
   b. It may not require that any subcontractor be signatory to an agreement on other than the single job site of the agreeing contractor, *and*
3. The agreement must be designed to meet the basic purpose of the § 8(e) construction industry proviso which is to avoid job site tensions likely to occur when union and non-union employees work side-by-side on a single construction project.[5]

Those requirements are the product of this Court's careful accommodation of two seemingly conflicting Congressional desires. Thus, in *Connell*, this Court recognized that agreements restricting subcontracting only to union firms allows unions to engage in "top-down" organizing by requiring that a subcontractor recognize a union as a representative of its employees regardless of the desires of those employees. This Court further recognized that such "top-down" organizing was in direct conflict with the basic purpose of the NLRA which is to protect employee free choice in choosing or declining to choose a Union representative. On the other hand, Congress had legislated the 8(e) proviso which allowed at least some restricted subcontracting in the construction industry.

In *Connell* this Court had to decide the extent to which Congress intended that the construction industry was to be exempt from the basic labor policy of the country—the policy of employee free choice. To decide

[5] The purpose of the construction industry proviso to § 8(e) is met by requiring that all employees on a single job site be union represented. It is not necessary that the agreement require that employees be represented by any particular union or unions, and, to so require does violence to other important NLRA policies.

that issue this Court looked for the reason behind Congress' enactment of the § 8(e) proviso and found that Congress was concerned that job site friction might arise on a particular construction site if union members were employed by a contractor with whom that union had a collective bargaining relationship and were to work side-by-side with non-union employees. To meet that concern this Court found that Congress had intended to allow construction employers and unions, as part of their bargaining relationship, to enter into an agreement covering a particular job site which would insure that all employees on that job were union represented. And absent any clear statement from Congress that it intended to go any further in eliminating employee choice, this Court properly concluded that Congress had privileged only those restrictive subcontracting agreements which were limited to meeting the problem envisioned by Congress.

But the National Labor Relations Board ("NLRB") and two Circuit Courts have disagreed[6] and have held that construction industry restrictive subcontracting agreements are lawful under the § 8(e) proviso if:

1. The agreement arises out of a collective bargaining relationship *or*
2. The agreement requires that all employees on the job be union represented,

and such an agreement is lawful:

1. Even if the agreement covers multiple job sites, including future sites, and
2. Even if the agreement requires that a subcontractor sign union agreements covering all its work on all job sites, and

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[6] *Woelke & Romero Framing, Inc.*, 239 NLRB 241 (1978); *Utilities Serv. Engineering, Inc.*, 239 NLRB 253 (1978); *Sullivan-Kelly & Associates*, 239 NLRB 264 (1978); *Pacific Northwest-ABC*, 239 NLRB 274 (1978); *Donald Shriver, Inc. v. N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, —— U.S. ——, 49 USLW 3825 (1981); *Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065 (9th Cir. 1981).

3. Even if the agreement requires that a subcontractor sign an agreement with a specific union (e.g., "an AFL-CIO union").

Because the NLRB and those courts have misinterpreted this Court's *Connell* decision, and by so doing have sanctioned the use of restrictive subcontracting agreements as massive "top-down" organizing tools for construction unions, we respectfully urge this Court to reverse the decision in this case.

ARGUMENT

IN ORDER PROPERLY TO ACCOMMODATE THE NATIONAL POLICY FAVORING EMPLOYEE FREE CHOICE IN THE SELECTION OR REJECTION OF A UNION REPRESENTATIVE, A VALID CONSTRUCTION INDUSTRY RESTRICTIVE SUBCONTRACTING AGREEMENT MUST BE LIMITED TO A COLLECTIVELY BARGAINED AGREEMENT WHICH ALLEVIATES JOB SITE FRICTION BETWEEN UNION AND NON-UNION WORKERS ON A SINGLE JOB SITE.

Although restrictive subcontracting clauses in the construction industry vary from one labor-management agreement to another, the kind of clauses involved in the cases before this Court have a common theme: they commit the general construction contractor to subcontract no on-site construction work to any subcontractor unless that subcontractor's employees are covered by a union contract. Such clauses are normally called "union signatory" clauses, and violate Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) unless they meet the requirements of the so-called "construction industry proviso" in Section 8(e). E.g., *Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065, 2069 (9th Cir. 1981). Whether or not the *proviso* requirements are met depends upon how this Court's decision in *Connell* is read and interpreted—and that is the issue in the instant case.

In dealing with this issue, it is important to understand, as the *Connell* Court did, that restrictive subcontracting agreements can and are used by construction unions as "top-down" organizing tools. "Top-down" organizing is a term which generally describes union efforts to gain new members by requiring an employer to recognize the union as the representative of his employees, thereby unionizing those employees regardless of their wishes. Restrictive subcontracting clauses have this "top-down" organizing effect because they require that subcontractor-employers recognize a union as the representative of their employees.

It is also important to remember, when judging how far Congress intended to go in allowing such restrictive agreements, that the basic purpose of the NLRA has always been to protect the right of employees freely to choose or reject union representation—a purpose which is hardly fostered by widespread approval of "top-down" organizing.

As we show below, the *Connell* Court understood the delicate balance required by competing Congressional desires and concluded that Congress intended to approve only those restrictive subcontracting agreements which were necessary to meet the construction industry problem it saw—the possibility that friction may occur on a job site if union members employed by a contractor with a bargaining relationship with their union were to work beside non-union employees on that job. The Ninth Circuit in this case misconstrued this Court's *Connell* decision by improperly broadening the scope of the 8(e) construction proviso beyond the limits intended by Congress. Accordingly, this Court should reverse.

a. The Avoidance Of "Top-Down" Organizing To The Fullest Extent Possible Is Paramount To The Scheme Of The Act.

The ruling below failed to recognize that the construction proviso to Section 8(e) must be read within the context of the entire NLRA and in light of the objectives

Congress intended to achieve by its enactment.[7] And the Circuit thereby failed adequately to consider the central theme which permeates the Act—the protection of the right of employees to bargain collectively through representatives of their own choosing, or to refrain from such activity.[8]

Indeed, the very 1959 amendments which added the 8(e) proviso to the NLRA specifically reinforced the Act's policy in favor of free employee choice and against "top-down" organizing by establishing "careful limits on the economic pressure unions may use in the aid of their organizational campaign." *Connell*, 421 U.S. at 633. Accordingly, Section 8(b)(7) limited the use of recognitional picketing and provided for elections to determine if employees desired union representation.[9] While Sec-

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[7] "It is a familiar rule that a thing may be within the letter of the statute but yet not within the statute, because not within its spirit, nor within the intention of its makers." *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 619 (1967).

[8] Section 7 of the Act provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities. . . .*" (Emphasis added.)

[9] As this Court stated in *NLRB v. Iron Workers (Higden Construction Co.)*, 434 U.S. at 346-347):

> As for Section 8(b)(7), which, along with Section 8(f), was added in 1959, its major purpose was to implement one of the Act's principal goals—to ensure that employees were free to make an uncoerced choice of bargaining agent. As we recognized in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Id.*, at 632 and references cited therein.

tion 8(f) permits construction contractors to recognize a union before it has actually attained majority status, such agreements may be challenged in a representation election to preserve the employees' right to select or decline representation. Indeed, in *N.L.R.B. v. Iron Workers (Higden Construction Co.)*, 434 U.S. 335 (1978), this Court stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry," for "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being establish to the majority principle" (434 U.S. at 347-348, n. 10).

Therefore, Congress could not have intended that Section 8(e) construction proviso agreements be used by unions for wholesale organizing purposes because that would be counter to the basic policy of the NLRA and undo for the construction industry the carefully developed policy reflected by Sections 8(b)(7) and 8(f) of the Act.

However, it is clear from those 1959 amendments that Congress did intend to legalize certain subcontracting agreements in the construction industry despite their organizational impact, but the issue remains: What agreements did Congress intend to legalize and what agreements were to be illegal?

The answer to that critical issue is found in the Congressional debates preceding the enactment of Section 8(e) where concerns were expressed about "the frictions that arise when Union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. N.L.R.B.*, 361 F.2d 547, 557 (D.C. Cir. 1966). And this Court in *Connell* found that those Congressional concerns were intended by Congress to be met by a clause arising out of a collective bargaining relationship, which is limited to a specific

job site and which requires that when members of the agreeing union are working on the site all other employees on that site must be unionized. Any broader clause goes beyond Congress' concern and, thus, unnecessarily and impermissibly destroys employee free choice.

b. The Subcontracting Agreement Must Arise From A Collective Bargaining Relationship.

The *Connell* Court concluded that a valid subcontracting clause must be entered into in the context of a collective bargaining relationship. And for good reason. Given the "top-down" organizing potential of subcontracting agreements and absent a clear statement by Congress that it intended such agreements to be entered into and enforced outside the context of a bargaining relationship, it should not be presumed that Congress intended to validate agreements between stranger employers and unions. This conclusion is particularly true because the Section 8(e) proviso is found in a statute which clearly contemplates that labor-management agreements will be reached in the context of a bargaining relationship. Further, if the union and the employer are in fact "strangers," the union's reason for seeking the subcontracting agreement is to gain representation rights over other employees, rather than the protection of the legitimate interests of those employees whom it already represents. And no one contends that Congress' purpose in enacting the 8(e) proviso was to specifically grant to construction unions a "top down" organizing weapon which serves no other purpose.

Even the NLRB and the Circuits which have considered this issue agree that the first inquiry in determining the validity of a restrictive subcontracting clause must be whether it arose from a collective bargaining relationship. The problem with the NLRB and Circuits, however, is that they would find such a clause to be legal if it arises out of a bargaining relationship without considering whether it is restricted to a specific job or whether it meets the purpose of the proviso—to reduce

job site friction arising from union employees working side-by-side with non-union workers. And the NLRB and Circuits compound their error by further suggesting that even if the restrictive subcontracting agreement does not arise from a collective bargaining relationship, it is still lawful if it meets the "side-by-side" purpose of the 8(e) proviso even though it is not limited to a specific job site.[10] In so holding, the NLRB and Circuits simply disregarded this Court's description of the clause found to be illegal in *Connell* (421 U.S. at 631):

> Local 100 does not suggest that its subcontracting agreement is related to any of these policies. It does not claim to be protecting Connell's employees from *having to work alongside non-union men.* The agreement apparently was not designed to protect Local 100's members in that regard, since it was *not limited to jobsites on which they were working.* [Emphasis added.]

What this Court said in Connell was that *all* three of the above noted requirements—(1) a bargaining relationship, (2) a specific job and (3) protecting union workers from working side-by-side with non-union workers—must be met in order for a restrictive subcontracting clause to be valid under the construction industry

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[10] The conclusion of the NLRB and Circuits that a collective bargaining relationship need not exist when a union seeks the subcontracting clause to protect its members from working alongside non-union workers has the effect of totally reversing this Court's decision in *Denver Building Trades (N.L.R.B. v. Denver Building Trades,* 341 U.S. 675 (1951)), which Congress declined to do when it enacted the 8(e) proviso (*Connell,* 421 U.S. at 630) and has consistently declined to do in rejecting so-called "Common Situs Picketing" legislation. See Nash, *Common Situs Picketing—Why the Uproar?* 2 Employee Relations Law Journal 24 (Summer 1976). Thus, any union representing a subcontractor's employees on a job site could picket the general contractor to obtain an agreement that he will remove all non-union subcontractors from his job site even though that union has no bargaining relationship with the contractor.

proviso.[11] Indeed, only a clause meeting all of these requirements will both fulfill the purpose of the 8(e) proviso, and, at the same time, accommodate Congress' concern that such clauses not be used as massive "top-down" organizing weapons which unduly and unnecessarily impinge upon the rights of employees to select whether or not they wish to be represented by a labor organization.[12]

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[11] Responding to the controversy over whether the requirements of *Connell* are to be read in the conjunctive or disjunctive, commentator Leonard S. Janofsky concluded that both conditions must be met:

> "Taking the rationale of *Connell*, it seems to me that the 'all jobsites' aspect of the clause goes too far. First, such a broad reach, even in the context of a collective bargaining agreement, presents exactly the same 'top-down' organizing evil which *Connell* condemned. Second, such an 'all jobsites' clause, even as part of a collective bargaining agreement, at least potentially goes well beyond what has been recognized as a union's legitimate concern against having its members working side-by-side with non-union workers." (Janofsky & May, *Connell—Consistent with Past, Indicative of Future*, Proceedings of the New York University, 29th Annual Conference on Labor, 1976.)

See also Nash, *Connell "Hot Cargo" Agreements: The Supreme Court as Interpreted by the NLRB*, 83 Dickinson L. Rev. 661 (1979).

[12] The NLRB General Counsel initially concluded that clauses agreed upon in a collective bargaining relationship that extend to job sites where the signatory contractor does not employ members of his own, are "broader than required by the union's legitimate interests" and therefore, "are not within the scope of the proviso." *NLRB General Counsel's Memorandum on Connell*, 1976 Lab. Rel. Yearbook 295 (BNA, 1977). Moreover, several district courts have found that a collective bargaining relationship in itself is insufficient to validate an overly broad subcontracting clause. A number of courts have interpreted *Connell* to mean that even agreements arrived at within a bargaining relationship must also meet additional requirements to be protected by the 8(e) proviso. *Long v. Floorcraft Carpet Co.*, (not officially reported) 95 LRRM 3134 (D.Ore. 1977); *Long v. Pam's Carpet Service, Inc.*, (not officially reported) 95 LRRM 3145 (D.Ore. 1977), *Operating Engineers v. Neilsen & Co.*, (not officially reported) 92 LRRM 2861 (D.Id.

Thus, even though the subcontracting clause in this case arose from a collective bargaining relationship, it is not protected from illegality unless it meets the remaining requirements of the 8(e) construction proviso.

c. The Subcontracting Agreement Must Be Intended To Protect The Agreeing Union's Members From Working Side-By-Side With Non-Union Workers.

Again recognizing Congress' established desire that restrictive subcontracting clauses not be given such a broad effect that they create too large a loophole in the Congressional limitation of "top-down" organizing tactics, this Court held in *Connell* that the construction proviso was intended to protect subcontracting agreements only to the extent that they protect the agreeing union's members from having to work alongside non-union employees on a specific job site.[13] That was the problem the Con-

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1975); *Waggoner v. McGray, Inc.*, 432 F.Supp. 580, 583 (C.D.Cal. 1977). See also *NLRB v. International Union of Operating Engineers, Local 542*, 543 F.2d 802, 906-07 (3rd Cir. 1976).

[13] The Court below suggested that Congress may have intended that the 8(e) proviso further another construction union objective in addition to protecting union members from working beside non-union employees. And that objective was to allow restrictive subcontracting agreements in order that the agreeing union might protect the wage levels and economic benefits it had negotiated for its members. E.g., 107 LRRM at 2076, 2080. However, it is doubtful that the Ninth Circuit is correct, and even if it is, it makes no difference in the analysis or outcome of this case. First, this Court in *Connell* found that the 8(e) proviso was intended to protect against job site friction between union and non-union workers—not to protect negotiated wages and benefits. 421 U.S. at 630-31. That holding is consistent with the legislative history surrounding enactment of the 8(e) proviso, for, as the dissent below points out, very little was said in Congressional debates about the need for construction unions to protect wage and benefit levels by means of restrictive subcontracting agreements (107 LRRM at 2083) and even the few comments to that effect were made in favor of a proposal which would have overruled this Court's *Denver Building Trades* decision (341 U.S. 675), a proposal which was not

gress was addressing when it enacted the 8(e) proviso, and, again, absent a clear statement by Congress that it intended to legalize "top-down" organizing beyond that necessary to meet the needs of construction unions it was addressing, it can not be presumed that Congress intended to legalize broader subcontracting agreements. (421 U.S. at 431).

To accomplish this purpose, a union may seek to be party to a restrictive agreement only with regard to specific jobs where its members will be working. In other words, its members have to be on the job to warrant the protection of the proviso.[14] Further, the clause

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enacted by Congress. *Connell*, 421 U.S. at 629 n. 8. Second, even if Congress had intended that the 8(e) proviso would privilege agreements designed to protect negotiated wages and benefits, its intent has been fulfilled, for the NLRB and Courts in the mid-1960's began to uphold such "union standards" agreements (previously thought to be unlawful) as lawful primary agreements. E.g., *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (3d Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). But such agreements bear no relationship to the kind of agreement under review in this case, for a lawful union standards agreement may only restrict the subcontracting of work historically performed by the agreeing union's members and then only to a firm that pays equivalent wages and benefits—it may not restrict subcontracting of the work of other employees and it may not require that a subcontractor sign a union agreement. E.g., *Truck Drivers Union Local No. 413 v. N.L.R.B.*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). Such agreements, of course, do not restrict employee free choice for they do not require a subcontractor to recognize any union as the representative of its employees. As a consequence, no balancing of that basic statutory right is necessary and such agreements need not be limited to any particular job in order to meet Congress' desire to limit "top-down" organizing.

[14] Nowhere in the *Connell* decision is it suggested that the union party to the restrictive subcontracting agreement has any legitimate interest in protecting members of other unions from being required to work beside non-union employees. In fact, *Connell* found that Congress limited the purpose of the Section 8(e) proviso to the protection of members of the union seeking the agreement. "The agreement apparently was not designed to protect Local 100's mem-

must require that all other employees of the general contractor and all subcontractors be union represented, for only in that way will the agreeing union's members be protected from non-union employees on the job.

The subcontracting clause involved in the present case suffers from the very same deficiencies as the virtually identical clause considered in *Connell*. Both clauses involved an agreement that required subcontracting of the work within the agreeing unions' jurisdiction only to subcontractors that were signatory to agreements with the particular unions. And both clauses are illegal under § 8(e) because they do not insure that all other employees on the common job site will be union and accordingly, are outside the shelter of the construction proviso.

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bers. . . ." 421 U.S. at 631. Therefore, the union's object must be to protect its members, not union members generally.

The Ninth Circuit suggests that such a requirement will create insurmountable practical problems for construction unions because they will be required to police every job site to determine whether their members are working and thus require the protection of the subcontracting clause. But there is no reason why the union's members can't simply tell their union when they are on the job. Indeed, most will probably be referred from a union hiring hall in any event, thereby alerting the union to their presence on the job site. Further, there is no reason to suspect that the Board and Courts will rigidly require that the union's members be on the job every hour of every day in order for the restrictive subcontracting clause to be enforced. Thus, for example, in determining whether a union may picket a common site because of the presence of the contractor on the job with whom the union has a dispute, the Board has held that the temporary absence of the contractor or his employees from the job site does not, itself, transform an otherwise lawful picket line into an unlawful secondary boycott. *Local 3, IBEW (New Power Wire and Electric Corp.)* 144 NLRB 1089 (1963), *enforced in pertinent part*, 340 F.2d 71 (2d Cir. 1965); *Kolodziej v. Local 697, IBEW*, —— F.Supp. ——, 92 LRRM 3537 (N.D.Ind. 1975), *aff'd*, 535 F.2d 1257 (7th Cir.), *cert. denied* 429 U.S. 857 (1976); *Electrical Workers, Local 861 (Plauche Electric, Inc.)*, 135 NLRB 250 (1962).

Further, the *Connell* Court properly found that the Congressional purpose behind the 8(e) proviso was to protect union members from working alongside non-union members. Never did Congress evidence an intent to allow one union to dictate any particular union that a subcontractor's employees must join. Thus, any subcontracting agreement which seeks to specify particular unions with whom subcontractors must have an agreement (as did the restrictive agreement in this case) fails to meet the requirements of the proviso and violates § 8(e).

Passages throughout the *Connell* opinion (as well as the oft-stated Congressional objective of limiting the use of subcontracting agreements as organizational weapons) support this view. Thus, this Court noted: "The agreements with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that *did not have a contract with Local 100.*" 421 U.S. at 624 (emphasis added). Further, this Court's discussion of the proviso's purpose deals with the interest of union employees working next to other union employees and nowhere mentions any legitimate need to specify the union alongside whom their members must work.

Further, this Court in note 8 suggests that in enacting the Section 8(e) proviso, Congress intended simply to preserve the *status quo* under *Local 1976, Carpenters v. N.L.R.B.* (*Sand Door*), 357 U.S. 93 (1958). In *Sand Door*, this Court was dealing with a restrictive clause providing that "workmen shall not be required to handle non-union material" (as well as with a clause directed at an "unfair company"). *Id.* at 95, 97. Although the *Sand Door* Court did not consider the validity of such a clause, and, thus, presumably considered it legal for its purposes, it clearly was dealing with a general "non-union" clause and not one specifying any particular union. Therefore, to the extent that the *status quo* under *Sand Door* was intended to be maintained by

the Section 8(e) proviso, only such general clauses would be legitimate under the proviso.[15]

Finally, where Congress has indicated no special desire to privilege restrictive subcontracting agreements that specify a particular union or unions that must represent employees on the job site, this Court should not presume that such an agreement was intended to be made lawful by the 8(e) proviso. Such a restriction would not only require that employees be union represented (which, of course, is the effect of even a valid 8(e) proviso agreement) but it would further restrict their basic right under the NLRA to select which union they wished to represent them. Further, employees who have previously elected a union of their choice ought not to be frozen from the market place for doing so, and their employer ought not to be precluded from obtaining work because its employees have exercised their statutory right to select a union of their choice to represent them.

In sum, the clause in the present case violates Section 8(e) because it does not protect the union's members from working side-by-side with non-union workers and because it specifies a particular union that must represent employees of a subcontractor performing part of the work on the job site.

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[15] It might be argued that this construction of the Court's opinion in *Connell* is contrary to the implicit holdings in cases such as *Essex County & Vicinity District Council of Carpenters v. N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964), and *Dallas Building & Construction Trades Council v. N.L.R.B.*, 396 F.2d 677 (D.C. Cir. 1968), which upheld, as protected by the Section 8(e) proviso, agreements which provided that work done by others than members of the union signatory to the agreement with the contractor must be done only by firms signatory to agreements with specific unions (*Essex*—"a union affiliated with the Building Trades Department of the AFL-CIO"; *Dallas*—"agreements with the appropriate Council-affiliated Local"). However, the courts' opinions in those cases do not reveal that it was argued that such clauses were invalid because they were so limited to specific unions. Further, to the extent that *Connell* is inconsistent with those earlier lower court opinions, they would be implicitly overruled on this point.

d. The Subcontracting Restriction Must Be Limited To A Particular Job Site.

The *Connell* Court also found that Congress had intended a further limitation on the restrictive subcontracting agreements. Thus, even though a lawful agreement must arise from a collective bargaining relationship, and even though it must be limited to ensuring that all employees on a construction site are union represented, still the subcontracting agreement would have massive "top-down" organizing potential because unions would be free to "enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some job site somewhere." 421 U.S. at 631-32. In light of Congress' express desire to limit organizational and recognitional economic weapons, this Court concluded that Congress could not have intended such a result.

This Court then looked again to determine what problem Congress sought to correct with its 8(e) proviso, and concluded that Congress had sought to provide some relief to construction unions from the decision in the *Denver Building Trades* case (341 U.S. 675 (1951)). The *Denver Building Trades* case had found union picketing of a single multi-employer site to be illegal where the union sought the removal of a non-union subcontractor from that site only. As made clear by the dissent of Justice Douglas (341 U.S. at 692):

> The Union was not pursuing the contractor to other jobs. All the Union asked was that union men not be compelled to work alongside non-union men on the same job. As Judge Rifkind stated in an analogous case, "the Union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."[16]

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[16] Quoting *Douds v. Metropolitan Fed'n*, 75 F. Supp. 672, 677 (S.D.N.Y., 1948) (footnote omitted).

Thus, the *Denver Building Trades* problem with which the Congress was dealing was limited in scope. And Congress appropriately dealt with it in a limited manner by "limit[ing] the construction industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on *a* job site." 421 U.S. at 630 (emphasis added).[17]

Further, the *Denver Building Trades* case had not involved any effort by the union to affect the subcontractor's union or non-union status on other than the single job being picketed, and there is no reason to believe that Congress intended any such result. Indeed, even Justice Douglas' dissent in *Denver Building Trades* implied that union pressure on other jobs of the subcontractor would have been improper. Thus, Congress must have intended not only that restrictive agreements be limited to a single specific construction project but, further, that a union and general contractor could not agree to compel a subcontractor to become signatory to a union contract in regard to any work of that subcontractor other than on the specific job site covered by the subcontracting agreement. Therefore, the subcontracting agreement in the case now before this Court violates Section 8(e) for it extends to all of the agreeing contractors' jobs and re-

[17] The Ninth Circuit supports its contrary conclusion to the effect that general subcontracting agreements may be negotiated covering multi-projects by alluding to alleged practical problems with this Court's requirement that the agreement be limited to a specific job site. Thus, according to the Ninth Circuit a union would have to constantly search out jobs of the general contractor and then go to all the trouble of negotiating a separate subcontracting agreement for each site. But the Court overlooks the fact that a union may only negotiate the subcontracting agreement on jobs where its members will be working. Even if those members are not referred to the job by the union's hiring hall (which will be the normal case and which will clearly give the union notice of the contractor's job), it is reasonable to assume that those union members who are concerned about working next to non-union workers will alert their union. Further, it is reasonable to assume that construction unions now have, or will promptly develop, standard subcontracting clauses which can quickly and easily be accomodated to each job.

quires subcontracting to only a totally union subcontractor.

e. The Failure By The Ninth Circuit And The NLRB To Recognize The Restrictions Intended By Congress On A Legal Subcontracting Agreement Allows The Use Of Such Agreements As Massive "Top-Down" Organizing Weapons.

To briefly summarize, this Court held in *Connell* that Congress had limited the legality of restrictive subcontracting agreements in order to retain, to the fullest extent possible, the right of construction industry employees to select or reject union representation of their own choosing. Congress did so by requiring that the agreement be negotiated in the context of a collective bargaining relationship, by requiring that the agreement be limited to a single job site and by requiring that the agreement meet the purpose which Congress had intended—to prevent possible job site friction that might occur if union workers worked alongside non-union workers. The NLRB and Ninth and D.C. Circuits[18] have disagreed by holding that a restrictive subcontracting agreement is lawful either if it arises out of a bargaining relationship or it seeks to prevent job site friction, and the agreement remains lawful even if it covers multiple job sites, even if it requires a subcontractor to be unionized on all his jobs and even if it requires that the subcontractor sign agreements with specific unions.[19]

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[18] See note 6, *supra*.

[19] The Ninth Circuit sought support for its conclusion that a collective bargaining relationship was enough to validate an 8(e) proviso agreement by suggesting that it was only the absence of such a relationship that compelled this Court to find the clause in *Connell* unlawful. The Circuit reasoned that it was necessary for this Court to find the subcontracting clause in *Connell* illegal, otherwise the union would have been free to engage in coercive picketing without end because the picketing was not subject to the

The following examples illustrate the "top-down" organizing potential of this Court's analysis as compared to that of the NLRB and Ninth Circuit:

This Court's Connell Analysis.—Assume the Laborers Union has a collective bargaining relationship with a general contractor and obtains agreement upon a clause restricting subcontracting on one particular job where Laborers Union members will be working for subcontractors who have union contracts. Assume that five subcontractors are hired by the general contractor and all of those subcontractors sign collective bargaining agreements with unions. The original restrictive subcontracting clause would be lawful if it was bargained in the context of a collective bargaining relationship, it related only to a particular job, and it met the purpose of the Section 8(e) proviso by protecting unionized laborers who would be working on that job from having to work alongside any non-union labor. In addition, however, the restrictive subcontracting clause in this hypothetical could not be used as a massive organizing weapon. Each of the subcontractors on the job were required to sign a union contract covering only that job. The restrictive subcontracting clause in this hypothetical did not require that those subcontractors sign an agreement with any par-

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strictures of Section 8(b)(7) inasmuch as the union in *Connell* disclaimed any interest in representing Connell's employees. But this analysis was not the basis for this Court's *Connell* decision, and for good reason. It is simply not true that § 8(b)(7) does not apply in these circumstances. Where a union pickets a general contractor to obtain an 8(e) proviso agreement and that contractor has its own employees who could perform the work covered by the proviso agreement, then the union's picketing violates 8(b)(7) whether or not the union seeks to represent the contractor's employees. *Building Construction Trades Council of Delaware (Pettinaro Construction Co.)*, 230 NLRB 42 (1977); See also *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemose Construction Co.)*, 222 NLRB 1276 (1976); *N.L.R.B. v. International Brotherhood of Electrical Workers, Local 265 (R P & M Electric)*, 604 F.2d 1091 (8th Cir. 1979).

ticular union, thereby leaving the employees of these subcontractors some choice regarding which union they wished to represent them. The net result is that, at most, five employee units of non-union subcontractors would be covered by union agreements, with the employees having a choice of representative.

The NLRB's and Circuit Courts' Analyses.—Assume, as above, that the Laborers Union has a bargaining relationship with a general contractor and obtains an agreement restricting subcontracting on all its jobs to only firms who have AFL-CIO agreements covering all of their jobs. Assume that the general contractor is performing five jobs and employs five different subcontractors on each job. Because the restrictive subcontracting clause in question arises from a collective bargaining relationship and because the Board and Circuits have concluded that this alone is enough to privilege such an agreement, each of the 25 subcontractors will be required to sign AFL-CIO contracts that cover not only their work on the job being performed for this general contractor, but which covers all of their other work as well. Assume further that these 25 subcontractors are working on two other jobs each and that the union with whom each has an agreement seeks from each of the 50 general contractors an agreement restricting all work on those jobs to only AFL-CIO firms in order to protect their union members from having to work alongside non-union labor on those jobs. If each of those 50 jobs employed four other subcontractors, then 250 more collective bargaining units (including only one each for each of the general contractors) would be required to be unionized. And that result would be lawful under the Board's and Circuits' decisions because the unions involved, although having no collective bargaining relationships with the 50 general contractors, would meet the alternative requirement for legality—an agreement to protect their members from being required to work alongside non-union members.

Accordingly, the potential effect of one restrictive subcontracting agreement negotiated with one general contractor is the unionization of 325 units of employees, all by AFL-CIO unions.[20]

As these examples illustrate, the NLRB and the Circuits have simply failed to take into account the Congressional desire to limit the use of construction-industry subcontracting agreements as "top-down" organizing weapons. As a result the decision below must be reversed by this Court.

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[20] The 325 units referred to in the hypothetical above include the initial 25 subcontracting units on the general contractor's jobs, the other 50 units of those subcontractors employed on other jobs, the 50 general contractors whose employees will be required to be covered by AFL-CIO contracts, and the additional 200 subcontractors working for those general contractors whose firms will be required to sign agreements with the AFL-CIO unions.

These hypothetical figures do not, of course, represent reality. Rather they are used merely to compare the relative "top-down" organizing potential of two different interpretations of this Court's *Connell* decision. Thus, for example, if the Board and Circuits are correct and an 8(e) proviso clause need not be limited to a specific job site, then many (if not most) restrictive subcontracting clauses will be negotiated with multi-employer associations, and will bind many general contractors, not just one. Indeed, that is what happened in the instant case. See *Operating Engineers, Local 710*, 239 NLRB 274, 275 (1978), *enforced sub nom. Pacific Northwest Chapter of ABC v. N.L.R.B.*, —— F.2d ——, 107 LRRM 2065 (9th Cir. 1981). Accordingly, the "top-down" organizing potential of such clauses will be substantially broadened. On the other hand, it is likely that each subcontractor in an area will be working on more than one job for a single general contractor, or that two or more subcontractors on one job will also be working side-by-side on other jobs. Thus, the "top-down" organizing potential of a single restrictive subcontracting clause with one general contractor will not be as great, as a practical matter, as the potential set forth in the text above.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the decision of the Ninth Circuit in this case should be reversed.

Respectfully submitted,

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